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90-1033

Supreme Court, U.S.
FILED
DEC 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

ROBERT BRADLEY
AND NORMAN SPECK

Petitioners/Appellants,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Eleventh Circuit Court of Appeals that the severance in mid-trial of marijuana counts from cocaine counts in the indictment, over the objections of the Petitioners, did not constitute a bar to retrial on those counts, on the grounds of manifest necessity, was in direct conflict with Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), and Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

LIST OF INTERESTED PARTIES

TRIAL JUDGE	Kenneth L. Ryskamp
Petitioners	Robert Bradley and Norman Speck
UNITED STATES OF AMERICA	Eileen O'Connor Assistant United States Attorney
ATTORNEY FOR Petitioners	Alvin E. Entin, Esq.
ALLEGED VICTIMS	None

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioners, ROBERT BRADLEY and NORMAN SPECK, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the District Court to sever the marijuana counts from the indictment was an oral pronouncement in open court at trial. The Order of the Court denying the Petitioners' Motions to Dismiss on double jeopardy grounds was rendered on March 2, 1989, and is reprinted herein. (App.). The opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in United States v. Bradley, 905 F.2d 1482 (11th Cir.1990), was rendered on July 13, 1990, and is reprinted herein. (App.). The Order denying Petitioners's timely-filed Petition for Rehearing was rendered by the Court on September 6, 1990, and is reprinted herein. (App.). The Mandate was issued on September 17, 1990.

JURISDICTION

This petition arose in the first instance from criminal charges filed in the United States District Court for the Southern District of Florida. The Petitioners were charged with criminal violations pursuant to Titles 18 and 21 of the United States Code. The District Court has jurisdiction over such actions pursuant to Title 18 U.S.C. § 3231.

The order of the District Court denying the Petitioners' Motions to Dismiss (App.) was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This court has jurisdiction over this petition pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same

indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of

offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

On September 23, 1987, a federal grand jury sitting in the Southern District of Florida returned a twenty-nine (29) count indictment against the Defendants, NORMAN SPECK and ROBERT BRADLEY, and nineteen (19) other

individuals. SPECK was charged with conspiracy to import cocaine, in violation of 21 U.S.C. § 963 (Count II) conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (Count III), conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count IV), conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 (Count V), interstate travel to promote unlawful activity, in violation of 18 U.S.C. §§ 1952 and 2 (Count X), importation of cocaine, in violation of 21 U.S.C. § 952 and 18 U.S.C. § 2 (Count XX), and possession of cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count XXI). BRADLEY was charged with the same violations as SPECK in Counts II, III, IV, V, and X. He was also charged in Count XII with importation of cocaine, in

violation of 21 U.S.C. § 952 and 18 U.S.C. § 2, and in Count XIII with possession of cocaine with intent to distribute, in violation of both 21 U.S.C. § 841(a)(1) and 189 U.S.C. § 2. A superseding indictment which added additional property to the forfeiture provisions of Count I (relating only to the Defendant THOMAS SIKES) was filed on June 8, 1988.

On May 18, 1988, NORMAN SPECK filed a Motion for Severance Based upon Prejudicial Joinder and Supporting Memorandum of Law. The motion requested a severance of the Defendant from his co-defendants pursuant to Rule 14 of the Federal Rules of Criminal Procedure. The gravamen of the motion was that the evidence against certain other defendants was so compelling that it would "spill over" to the Defendant SPECK and deny him a fair trial. It requested that the counts in which Speck was named be tried

separately from those in which he was not named. Although this motion was not specifically adopted by Bradley, he had previously filed a general Motion to Adopt which encompassed it. In other words, the motion was for a severance of defendants, not of counts in the indictment. Although the government filed a response to the motion on June 13, 1989 the court did not rule on the motion prior to trial.

Trial commenced for all defendants on June 13, 1988. On June 14, at the close of the government's opening statement, the defendant ROBERT FOWLKES made an oral motion for severance, renewing a previously-filed written motion, and pointing out that the government had outlined two separate conspiracies in the opening. The defendants SIKES and SCARA specifically joined the motion, at which time the Court indicated that all defendants would be considered as having

joined in unless they specifically indicated otherwise. Subsequently, the Court reserved ruling on the motion. On June 20, the Defendant THOMAS SIKES filed a Motion for Severance and Mistrial, requesting a severance of the marijuana counts of the indictment from the counts involving cocaine. The Court heard argument on the motion on the same day and again reserved ruling. The Defendants SPECK and BRADLEY did not participate in the argument, which revolved solely around SIKES' written motion. The motion was not adopted by SPECK and BRADLEY.

On June 28, 1988, several other motions for severance were made by some of the defendants and argued at length before the Court. These Defendants asked that the marijuana offenses, be severed from the cocaine charges, since SPECK and BRADLEY were the only defendants charged in the alleged marijuana conspiracy. The

Defendant NORMAN SPECK specifically requested that he not be severed out. BRADLEY joined in this request. On the following day, the Court, having re-read the indictment, severed out Counts 4, 5, and 10, the marijuana counts. The Defendants, NORMAN SPECK and ROBERT BRADLEY specifically objected to the severance.

On July 29, 1988, the jury returned a partial verdict as to NORMAN SPECK, finding him not guilty on all counts which they had considered. The jury was unable to reach a verdict on ROBERT BRADLEY as to the counts it considered.

On August 11, 1988, the Defendant SPECK, through new counsel, filed a Motion to Dismiss the Remaining Counts of the Indictment, based on the severance of the marijuana counts over the Defendant SPECK's objection. ROBERT BRADLEY filed a similar motion on February 27, 1989. The

Court heard argument on the SPECK motion on February 16. Both motions were denied on March 2.

Timely Notices of Appeal were filed by both defendants on March 10, 1989. After the filing of the required briefs, the case was submitted to the Court. The Court's Opinion was rendered on July 13, 1990. (App.). Rehearing was denied on September 6, and the Mandate issued on September 17. This Petition followed.

Both ROBERT BRADLEY and NORMAN SPECK are out on bond.

(ii) Statement of Facts

The evidence adduced by the government at trial was that Bradley and Speck were active participants in extensive marijuana and cocaine smuggling operations from 1984 to 1986. According to that evidence, Speck was co-pilot of a plane which flew marijuana from Jamaica to the United States as part of a smuggling

operation in 1984.

In connection with the alleged smuggling operation, Bradley added additional fuel capacity to aircraft, *i.e.* plumbed fuel tanks, to a second aircraft involved in the smuggling operation and made other repairs to that aircraft in addition to acting as a "spotter" for both aircraft as they arrived over the United States to determine if law enforcement aircraft were in pursuit.

In May, 1985, according to the government's witnesses, the participants in the marijuana smuggling operation became involved with cocaine because dealing in cocaine was more lucrative. The cocaine operation ran from May, 1985 until May, 1986.

Bradley allegedly continued to plumb, and provide repairs to, aircraft involved in the smuggling. In addition, on at least one occasion, Bradley was alleged to

have again acted as a "spotter" for aircraft returning to this country with cocaine.

The government also introduced evidence which it believed showed that Speck allowed aircraft owned by himself and his brother to be used in the smuggling operation, "plumbed" certain of those planes prior to takeoff, and "checked out" one of the pilots who was to fly in the smuggling operation in one of his aircraft.

This evidence, at least that concerning the cocaine counts, was, as to SPECK, totally rejected by the jury. It apparently believed the government witnesses were incredible. The substantive witnesses as to the marijuana counts are the same witnesses whose testimony was rejected by the jury on the cocaine counts.

The jury failed to return a verdict

on the cocaine counts against BRADLEY. Because of the severance, the jury was never permitted to consider the evidence on the marijuana counts as to either BRADLEY or SPECK.

REASONS FOR GRANTING THE WRIT

Simply put, the government and the district court were put on notice almost a month prior to trial by the Motion for Severance Based upon Prejudicial Joinder that the various counts in the indictment were misjoined. Instead of acting on this knowledge, the government opposed the motion for severance, and the district court failed to consider the issue prior to trial. It is noteworthy that the government did not even respond to the Petitioners' motion until the first day of trial.

Trial commenced for all defendants on June 13, 1988. On June 14, at the close of the government's opening statement, the

defendant ROBERT FOWLKES made an oral motion for severance, renewing a previously-filed written motion, and pointing out that the government had outlined two separate conspiracies in the opening. The defendants SIKES and SCARA specifically joined the motion, at which time the Court indicated that all defendants would be considered as having joined in unless they specifically indicated otherwise. Subsequently, the Court reserved ruling on the motion.

Thus, from the very inception of the trial, and before any prejudice was suffered, the Court was put on notice that there was at least a potential problem with regard to the government's charging of separate conspiracies in the same indictment. At this point, the Court could have granted the motion for severance without any double jeopardy problems arising, since BRADLEY and SPECK,

by their silence, were deemed by the Court to have adopted the motion. Again, however, the Court failed to rule, and the government, despite its awareness of the serious misjoinder problem, commenced the introduction of substantial volumes of testimony which was patently violative of the rights of the various defendants.

On June 28, 1988, several new motions for severance were made by some of the defendants and argued at length before the Court. The Petitioner, NORMAN SPECK, specifically requested that he not be severed out. On the following day, the Court having re-read the indictment, it severed out Counts 4, 5, and 10.

The Petitioners, NORMAN SPECK and ROBERT BRADLEY, specifically objected to the severance. Implicit in their reasoning was the belief that, because of the way the trial had progressed, they had a vested interest in continuing on to

verdict with the jury that had been seated. Despite this objection, the government now seeks to retry them on the very counts which were taken from the jury over the Petitioners' objections.

Where a judge, acting without the consent of a defendant, aborts the defendant's trial, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949). Although this "valued right" may be subordinated to the public interest, it may only be done so if there is an "imperious necessity" to do so. The court's discretion to discharge a jury in in a criminal case prior to verdict is to be exercised only in "very extraordinary and striking circumstances." Downum v. United States, 372 U.S. 734, 10 L.Ed.2d 100, 83 S.Ct. 1033).

The instant case does not provide

such circumstances. What the instant case does provide is the deliberate attempt by the government to steamroller a conviction by joining in one indictment numerous events and individuals who had no relationship to each other. It is indisputable that there was no connection between the alleged marijuana conspiracy with which SPECK and BRADLEY were charged, and the subsequent cocaine conspiracy which allegedly involved all of the defendants. Nevertheless, the government, despite the prejudice inherent in the misjoinder, persisted in its attempts to poison the atmosphere of the trial by refusing to acknowledge the obvious.

This misjoinder was coupled with, and exacerated by, the failure of the trial court to consider the implications of the Petitioners' motion for severance until well into the trial. It is true that, by the time the trial court considered the

severance motion, some kind of action had become necessary. But it was only made necessary by the stubborn refusal of the government to acknowledge the impropriety of its initial strategy, and the failure of the Court to act expeditiously.

The joining of the two conspiracies in one indictment was no accident or act of negligence. In reality, because of the weakness of the government's case in the cocaine counts, it sought to enhance its chances for convictions by including the marijuana counts in the indictment. The marijuana counts afforded the government the opportunity to at least present some documentary evidence to shore up the obviously weak allegations of its witnesses. The government should not be premitted to benefit from this prosecutorial overreaching by being afforded the opportunity of a second bite of the apple.

Ironically, the one point upon which both the Petitioners and the government agree is that there was no need for the court to sever the marijuana counts from the cocaine counts. In fact, both the government and the Petitioners argued against the severance.

In fact, it is critical to note that BRADLEY and SPECK specifically warned the Court of the potential double jeopardy implications of severing out the marijuana counts, **prior to the severance**! Thus it can not be said that the Petitioners led the district court into error. They made it clear that a severance would create severe problems. Nevertheless, the court granted the severance in a manner which was antithetical to the interests if all the parties, including the government.

All the Court had to do in order to cure the misjoinder was to sever those defendants from the trial who were being

damaged by the spillover effect of the evidence on the marijuana counts, or to bifurcate the trial. The Court had been requested to sever defendants prior to trial, after the government's opening statement, and earlier in the testimonial portion of the trial. None of those defendants could have in good faith raised the double jeopardy issues raised herein, since they requested the severance on numerous occasions.

On the other hand, neither SPECK nor BRADLEY was entitled to the severance, since, in their case, the joinder of the marijuana and cocaine counts was proper under Rule 8(a) of the Federal Rules of Criminal Procedure.

There was, consequently, no manifest necessity to sever the marijuana counts from the cocaine counts, and to therefore deprive the Petitioners, NORMAN SPECK and ROBERT BRADLEY, of their right to have the

instant case proceed to verdict before the jury panel chosen by them.

The value to the Defendants of retaining the tribunal chosen in the instant case is both obvious and compelling. The jury panel not only acquitted SPECK of all counts it considered, and was unable to reach a verdict as to BRADLEY, but in doing so, apparently had grave doubts as to the veracity and credibility of the same witnesses who will testify against the Petitioners if the marijuana charges are retried.

Furthermore, since the government was permitted to utilize the underlying facts of the marijuana conspiracy as "prior bad acts" evidence under F.R.Evid. 404(b), since SPECK was acquitted, and the jury failed to return a verdict on BRADLEY, it is not beyond the realm of reasonable speculation to conclude that they

disbelieved the government witnesses on their marijuana testimony as well as their testimony regarding the cocaine. Thus, the Petitioners have shown that substantial prejudice has been created by the district court's severance of the marijuana counts.

Even absent prosecutorial or judicial overreaching, double jeopardy policies are applicable where a court deprives a criminal defendant of his right to proceed to verdict before the first jury. United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971). Unlike the situation faced by this Court in Gori v. United States, 367 U.S. 364, 6 L.Ed.2d 901, 81 S.Ct. 1523 (1961), the severance did not the benefit the Petitioners in any way. Thus, even under the Gori standard, the denial of the Motion to Dismiss was error.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

ALVIN E. ENTIN, ESQ.
2450 N.E. Miami Gardens Drive
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Miami, Florida 33180
(305) 932-0550

PROOF OF SERVICE

COMES NOW, ALVIN E. ENTIN, Esq., on behalf of the Petitioners, ROBERT BRADLEY and NORMAN SPECK, and states to this Court:

1) That on the ___ day of _____, 1990, the attached Writ of Certiorari submitted on behalf of the Petitioners was mailed at the United States Post Office,

Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Petition for Writ of Certiorari has been furnished to Kenneth W. Starr, Solicitor General of the United States, 10th and Constitution, N.W., Washington, D.C. 20530.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

_____

ALVIN E. ENTIN, ESQUIRE
2450 N.E. MIAMI GARDENS DRIVE
SECOND FLOOR
MIAMI, FLORIDA 33180
(305) 932-0550

SWORN TO AND SUBSCRIBED before me this ____ day of _____, 1990.

_____

NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 87-6197-CR-RYSKAMP

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORMAN SPECK, ROBERT BRADLEY,

Defendants.
_____/

ORDER

THIS CAUSE is before the court on the motions of the defendants to dismiss the remaining charges on the ground that a trial of these charges would constitute double jeopardy within the meaning of the fifth amendment. Defendant Thomas Sikes has previously filed a similar motion which was denied by the court.

At the first trial of this cause, the entire indictment was placed before the jury. In this indictment, numerous conspiracies were charged. Some defendants were charged to be part of some

conspiracies but not a part of others. During the course of the trial, some defendants moved for a severance under Rule 14 claiming an improper joinder. The court originally denied the motions for severance. As the case progressed it became apparent to the court that it was difficult to separate the various conspiracies and that some severance was in order. The defendants urged the court to sever out the cocaine conspiracies and try only the marijuana conspiracies. The reason for this tactic is obvious as the penalties for conspiracy to possess and possession of marijuana is less than that of cocaine.

The court carefully considered the options available to it during the trial. If the cocaine conspiracies were severed out, some defendant would be dismissed from the case as they were only involved in the cocaine conspiracies. If the

marijuana conspiracies were severed out, all defendants would remain for trial. Furthermore, if the defendants were convicted under the cocaine conspiracies, the likelihood of the government pursuing the marijuana conspiracies was slight, thus effecting a judicial economy in avoiding another trial. The court decided to sever out the marijuana conspiracies and continue with the trial of the cocaine conspiracies. For obvious tactical reasons, the defendants objected to this solution.

The defendants now raise their double jeopardy arguments claiming they had a right to have their marijuana charges heard by the jury empaneled at that particular time. The court regards this argument as frivolous. The defendants wanted a severance of the marijuana charges and the cocaine charges, but wanted to be in a position to dictate

which charges were severed out and which remained for trial. The court granted their motion for severance but decided that judicial economy militated in favor of severing out the marijuana charges.

This severance was not caused by the government and the government obtained no tactical advantage from it. In fact, the government objected to the severance. The defendants now complain that it was not granted in the manner they requested. Accordingly, the defendants' motion to dismiss on double jeopardy grounds is denied.

The defendants who raised this issue have stated that they intend to appeal if their motion is denied. Although the court feels that this issue is frivolous, the court will sever out the defendant Donald Wilson for a separate trial since he is being held in pre-trial detention.

Based upon the foregoing, it is

ORDERED and ADJUDGED as follows.

1) The motions of defendants Speck and Bradley to dismiss are denied.

2) The court, sua sponte, severs the defendant Donald Wilson from the remaining defendants for a separate trial.

DONE and ORDERED at the United States District Court, Miami, Florida this 1 day of March, 1989.

/s/ Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: Alvin Entin, Esq.
Christopher Grillo, Esq.
Jon May, Esq.
Eileen O'Connor, Asst. U.S. Attorney

UNITED STATES of America,

Plaintiff-Appellee,

v.

Robert RRADLEY, Norman Speck,

Defendant-Appellants.

No. 89-5248.

United States Court of Appeals,

July 13, 1990.

Defendants were charged with marijuana and cocaine offenses. Codefendants were charged only with cocaine-related offenses. After trial began, the United States District Court for the Southern District of Florida, No. 87G197Cr-KLR, Kenneth L. Ryskamp, J., granted codefendants' motion to sever marijuana counts from cocaine counts. The jury acquitted one defendant on cocaine charges, and failed to reach verdict concerning any of the cocaine counts as to other defendants. Defendants moved for dismissal of marijuana counts, contending

that retrial on those counts was barred by double jeopardy. Motion was denied. Defendants appealed. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that: (1) denial of double jeopardy motion was appealable; (2) defendants did not waive their double jeopardy claim; and (3) manifest necessity existed for trial court to sever one or more charges and/or defendants and, therefore, retrial was not barred by double jeopardy.

Affirmed and remanded.

1. Criminal Law §1023(8)

Double Jeopardy §87

Defendants' contention that district court's severance during trial of marrjuana counts from cocaine counts, without their consent, deprived them of their constitutionally protected right to have their trial completed by jury selected to serve in that trial, thus

barring on double jeopardy grounds retrial of marijuana counts, was not frivolous; thus, denial of double jeopardy motion was appealable. U.S.C.A. Const. Amend. 5; 28 U.S.C.A. § 1291.

2. Double Jeopardy §99

Constitution protects defendant's valued right to have his trial completed by particular tribunal by requiring that trial judge declare mistrial without consent of defendant only after it determines that mistrial is manifest necessity. U.S.C.A. Const. Amend. 5.

3. Double Jeopardy §201

When trial court severed marijuana counts against two defendants only and proceeded with trial against all defendants on cocaine charges, those two defendants did not waive their right to claim double jeopardy as to marijuana counts as result of trial court's grant of their codefendant's motions for partial

severance; at no time did those two defendants make motion solely for severance of marijuana charges, but rather, after jury was sworn, they sought only total severance. U.S.C.A. Const. Amend. 5.

4. Criminal Law $1167(1)

Government's joinder of marrjuana counts with cocaine charges in same indictment was harmless error in connection with cocaine charges; one defendant was acquitted as to all cocaine counts, anJ jury failed to reach verdict as to other defendant concerning any of cocaine counts. Comprehensive Drug Prevention and Control Act of 1970, §§ 401(a)(1), 406, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 963.

5. Criminal Law § 620(6)

Double Jeopardy § 87

Trial court was entitled to sever marijuana charges against two defendants

without those defendants' consent and proceed with trial on cocaine charges against all defendants where improper misjoinder in indictment of marijuana and cocaine counts was not the result of bad faith by prosecutor, but at most bad judgment on part of prosecution and initial error by district court; thus, those two defendants were not entitled per se to interpose bar of double jeopardy to new trial against them on marijuana counts. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 963; U.S.C.A. Const. Amend. 5; Fed.Rules Cr.Proc.Rules 8(b), 14, 18 U.S.C.A.

6. Criminal Law § 1134(2)

To determine if severance of counts was manifest necessity, for purposes of determining whether trial on severed counts violates double jeopardy, reviewing

court must examine entire record in case without limiting itself to actual findings of trial court. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.; U.S.C.A. Const.Amend. 5.

7. Criminal Law § 1.148

Important consideration in appeal from trial court's severance of counts during trial without defendant's consent is whether trial court carefully considered alternatives and exercised sound discretion and did not act in abrupt, precipitous or erratic manner. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

8. Double Jeopardy § 87

Manifest necessity existed for trial court to sever one or more charges and/or defendants; thus, court did not abuse its discretion in severing marijuana counts against two defendants and proceeding with trial as to cocaine charges against all defendants, and retrial of marijuana counts against those two defendants was

not barred by double jeopardy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 963; 18 U.S.C.A. §§ 2, 1952; U.S.C.A. Const.Amend. 5; Fed. Rules Cr.Proc. Rule 14, 18 U.S.C.A.

Alvin E. Entin, Entin, Schwartz, Margules & Lazarus, Miami, Fla., for Robert Bradley and Norman Speck.

Dexter W. Lehtinen, U.S. Atty., Miami, Fla., Eileen M. O'Connor, Anne R. Schultz, and Linda Collins Hertz, Asst. U.S. Attys., Ft. Lauderdale, Fla, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges. and KAUFMAN *, Senior District Judge.

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

FRANK A. KAUFMAN, Senior District Judge:

Appellants Rohert Bradley and Norman Speck were among twenty-nine defendants indicted in the United States District Court for the Southern District of Florida pursuant to a twenty-nine count indictment filed on Septemher 23, 1987 in which various marijuana and cocaine offenses were charged. The indictment contained twenty-one counts charging substantive cocaine-related offenses (Counts 1-3, 12-29). All twenty-one defendants were charged with one or more cocaine-related offenses. In addition, the indictment contained eight counts charging substantive marijuana-related offenses. (Counts 4-11). Along with nine other of those defendants, Bradley and Speck were charged with relation to both marijuana

and cocaine.[1]

Owing to the status of two of the defendants, the case proceeded to trial against nine defendants, only two of whom,

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[1] In the indictment, Speck and Bradley, plus seventeen others, were charged in Count Two with conspiracy to import at least one kilogram of cocaine, in violation of 21 U.S.C. § 963. Count Three charged all defendants, including appellants, with conspiracy to possess with intent to distribute at least one kilogram of cocaine, in violation of 21 U.S.C. § 846.

Bradley and Speck, along with up to nine others who did not proceed to trial, were charged in Counts Four and Five, respectively, with conspiracy to import and conspiracy to possess with intent to distribute marijuana, in violation of Title 21 U.S.C. §§ 963 and 846, and in Count Ten with interstate travel to promote unlawful activity involving marijuana, in violation of 18 U.S.C. §§ 1952 and 2.

In addition, Bradley was charged in Count Thirteen with possession with intent to distribute at least one kilogram of cocaine, in violation of 21 US.C. § 841(a)(1). Speck was charged in Count Twenty with importation of at least one kilogram of cocaine, in violation of 21 U.S.C. § 952(a) and in Count Twenty-one with possession with intent to distribute at least one kilogram of cocaine, in violation of 21 U.S.C. § 841(a)(1).

Speck and Bradley were charged in any of the marijuana Counts.

Prior to trial and during the first four and one-half days of testimony of the twenty-four day trial, defendants filed various severance motions. Speck and Bradley sought complete severance from co-defendants on the basis of prejudicial spillover. The remaining defendants requested the severance of the marijuana counts from the cocaine counts.[2] The district court did not rule with respect to any of these motions prior to trial. However, on the fifth day of testimony,

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[2] In addition to Speck's pretrial Motion for Severance Based Upon Prejudicial Joinder, which was adopted by Bradley, co-defendant Robert Fowlkes filed a pretrial motion to sever the marijuana counts, which he orally renewed at trial, and in which co-defendants Thomas Sikes, John Weaver, and Francis Scara joined. At that time, the district court indicated that all defendants would be considered as having joined in the motion unless they specifically indicated otherwise. The government opposed all severance motions.

that court severed the marijuana counts from the indictment pursuant to Fed.R.Crim.P. 14 and continued the trial against the nine defendants in connection with the cocaine counts.

At the conclusion of trial, the jury acquitted Speck on each of the cocaine counts pursuant to which he was charged; however, the jury failed to reach a verdict concerning any of the cocaine counts as to Bradley. In addition, the jury found five of the remaining seven defendants guilty as to at least one of the cocaine conspiracy charges, and failed to reach a verdict as to two others.[3]

The trial court set the severed marijuana counts against Bradley and Speck apart for a subsequent trial, and denied

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[3]The separate appeals of Sikes and Weaver who were convicted upon some of the cocaine charges, have been decided adversely to them in an opinion filed by this court today.

appellants' motions to dismiss those charges. Contending as they had below that retrial of those remaining counts is barred by the Fifth Amendment of the Constitution, Bradley and Speck appeal. We affirm.

A. FACTS

The evidence adduced by the government at trial was that Bradley and Speck were active participants in extensive marijuana and cocaine smuggling operations from 1984 to 1986. According to that evidence, Speck flew an aircraft containing marijuana from Jamaica into the United States as part of a smuggling operation in 1984. In connection with that of operation, Bradley added additional fuel capacity, *i.e.* plumbed, to a second aircraft involved in the smuggling operation and made other repairs to that aircraft in addition to acting as a "spotter" for both aircraft as

they arrived over the United States to determine if law enforcement aircraft were in pursuit. In May, 1985, the participants in the marijuana smuggling operation became involved with cocaine because dealing in cocaine was more lucrative. The cocaine operation ran from May, 1985 until May, 1986. Bradley continued to plumb, and provide repairs to, aircraft involved in the smuggling. In addition, on at least one occasion, Bradley again acted as a "spotter" for aircraft returning to this country with cocaine. The government's evidence also showed that Speck allowed aircraft owned by himself and his brother to be used in the smuggling operation, "plumbed" certain of those planes prior to takeoff, and "checked out" in one of his aircraft one of the pilots who was to fly in the smuggling operation.

B. APPEALABILITY

[1] Under Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the denial of the double jeopardy motion is an appealable order, prior to trial, under 28 U.S.C. § 1291, if the "'claim[] of former jeopardy'" is "at least" 'colorable,'" and is not "`frivolous.'" Richardson v. United States, 468 U.S. 317, 322, 104 S.Ct. 3081, 3084, 82 L.Ed.2d 242 (1984), quoting Abney, 431 U.S. at 662 n.8, 97 S.Ct. at 2042 n. 8, and United States v. MacDonald, 435 U.S. 850, 862, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18 (1978). In Richardson, Justice Rehnquist wrote that "[a] colorable claim . . . presupposes that there is some possible validity to a claim." Id. 468 U.S. at 326 n. 6, 104 S.Ct. at 3086 n. 6.

The district court, in denying appellants' motion to dismiss the remaining charges against them, stated

that it regarded appellants' double jeopardy claims as frivolous. In United States v. Dunbar, 611 F.2d 985, 986 (5th Cir. 1980) (en banc), the Fifth Circuit,[4] held "that an appeal from the denial of a frivolous double jeopardy motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous." The court commented that "this rule implements a theory of dual jurisdiction" between the district court and the circuit court, nothing that "[t]he ideal of dual jurisdiction is not a new concept in federal jurisprudence." Id. at 989. Under Dunbar, the court below, after making a written finding the appellants'

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[4]Decisions of the United States Court of Appeals for the Fifth Circuit prior to October 1, 1981 are binding as precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

double jeopardy motion was frivolous, was not thereby divested of jurisdiction over the within case, despite appellants' finding of notices of appeal to the court. Accordingly, the district court could have proceeded to trial herein without awaiting the results of this appeal if the court's decision that the within double jeopardy claim is frivolous were correct.[5] However, in its brief, the government concedes that Bradley and Speck have presented a "colorable" double jeopardy claim, and, consequently, that this court

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[5]In that same Order in which it determined the double jeopardy claim to be frivolous, the court below stated: "The defendants who raise this issue [Speck and Bradley] have stated that they intend to appeal if their motion is denied. Although the court feels that this issue is frivolous, the court will sever out the defendant Donald Wilson for a separate trial since he is being held in pre-trial detention." Thus, it would appear that the district court, in its discretion decided not to proceed to trial against Speck and Bradley during the pendency of this appeal.

has jurisdiction to hear the instant appeal. In our view, that concession is appropriate, and we therefore treat the double jeopardy claim of appellants as nonfrivolous.

C. DOUBLE JEOPARDY PRINCIPLES

Speck and Bradley contend that retrial of the marijuana counts in the case[6] is barred by the Double Jeopardy Clause of the Fifth Amendment because, under United States v. Jorn, 400 U.S. 470, 484, 91 S.Ct. 547, 556, 27 L.Ed.2d 543 (1971), the district court's severance during trial without their consent, deprived them of their constitutionally protected right to have their trial completed by the jury selected to serve in that trial.

[2] "The Double Jeopardy Clause of

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[6]The marijuana counts which were severed during trial and which remain pending against appeallants are Counts Four, Five and Ten of the indictment.

the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1078, 47 L.Ed.2d 267 (1976) (footnote omitted). The Supreme Court has long held that the Fifth Amendment's double jeopardy prohibition mandates that "jeopardy attaches when the jury is empaneled and sworn." Crist v. Bretz, 437 U.S. 38, 35, 98 S.Ct. 2156, 2160, 57 L.Ed.2d 24 (1978), citing Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). Where a criminal defendant requests and is granted a mistrial, double jeopardy provision do not apply, absent prosecutorial or judicial misconduct which involves "bad faith in order to goad the [defendant] into requesting a mistrial." Dinitz, 424 U.S. at 607-08, 611, 96 S.Ct. at 1079-80, 1081; Jorn, 400 U.S. at 485,

91 S.Ct. at 557. However, "where the judge, acting without the defendant's consent aborts the proceeding, the defendant has been deprived of his `valued right to have his trial completed by a particular tribunal.'" Jorn, 400 U.S. at 484, 91 S.Ct. at 556, quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed 974 (1949) (footnote omitted). The Constitution protects that valued right "by requiring that a trial judge declare a mistrial without the consent of the defendant only after it determines that mistrial is a manifest necessity." Abdi v. State of Georgia, 744 F.2d 1500, 1503 (11th Cir. 1984), cert denied, 471 U.S. 1006, 105 S.Ct. 1871, 85 L.Ed.2d 164 (1985) (footnote omitted). In other words, in the absence of a motion or consent by the defendant, there can be no new trial unless "`there is a manifest necessity for [mistrial], or the ends of

public justice would otherwise be defeated.'" Jorn, 400 U.S. at 481, 91 S.Ct. at 555, quoting Justice Story in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824).

D. WAIVER

[3] Had the district court completely severed appellants from the trial as they requested, they would clearly presently have no double jeopardy claim absent a showing that the government intended "to subvert" the protections afforded by the Double Jeopardy Clause by "goad[ing them] into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982). See United States v. Posner, 780 F.2d 1536, 1537 (11th Cir.) cert denied, 476 U.S. 1182, 106 S.Ct. 2915, 91 L.Ed.2d 544 (1986). However, in this case, the district court did not so do but rather severed the marijuana counts only and

continued to trial against all of the defendants, including Speck and Bradley, as to the cocaine charges. When Bradley, as to the cocaine charges. When it so did, speck and Bradley objected to the proposed severance, sought instead a complete severance, rather than just a severance of the marijuana count, and advised the court that they were "going to take the position that jeopardy had attached and that there cannot be a trial in connection with those [severed marijuana] counts." The government suggests that since appellants moved for total severance out of concern for the possible taint or prejudicial spillover from the cocaine evidence adduced against co-defendants, they did not waive their right to claim double jeopardy as to the marijuana counts as a result of the trial court's grant of their co-defendant's motions for partial severance. In that

regard, appellants point out that at not time did they make a motion solely for severance of the marijuana charges. Rather, after the jury was sworn, they sought only total severance. In that context, Speck and Bradley are correct-and the government is wrong-with regard to the government's waiver contention.

E. JOINDER

According to appellants, the necessity for some type of severance was occasioned not by circumstances arising unexpectedly at trial but rather by the alleged initial misjoinder of the cocaine and marijuana counts in the indictment, and the govemment's refusal to give up the unfair advantage obtained thereby after trial started and up to and including the severance action by the district court.

[4] In the companion appeal arising from the same prosecution and trial as the within case, *United States v. John Weaver,*

et *al.*, 905 F.2d 1466,[7] Speck and Bradley's co-defendants, Sikes and Weaver, have challenged the government's joinder of the marajuana counts with the cocaine charges in the same indictment as improper. Speck and Bradley do not expressly raise any claim of improper joinder in this appeal. However, to the extent they implicitly so do, we hold such joinder erroneous for the same reasons stated in our opinion in *Weaver*, but also conclude that it is harmless error in connection with the cocaine charges against Speck and Bradley for the reason stated in *Weaver* and also because Speck was acquitted as to all of the cocain counts, and the jury failed to reach a verdict as to Bradley concerning any of the cocaine counts. However, Speck and Bradley assert that without the improper initial joinder in the indictment of the

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[7]*See* note 3, *supra*.

marijuana with the cocaine charges, they would not have been subject to nearly five days of trial on the marijuana charges before those charges were severed out. That brings us to application of the doctrine of manifest necessity.

F. MANIFEST NECESSITY

[5] Neither Bradley nor Speck has alleged-and the record does not reflect any bad faith conduct on the part of the judge or the prosecutor, or any intent on the part of the prosecutor to provoke any of the defendants in the trial below into seeking a mistrial. Quite the contrary, the record reveals that by joining all defendants and offenses into a single indictment, the prosecutor sought to try all of the defendants only once. Indeed, throughout the trial, the prosecutor opposed all of defendants' various motions for severance or mistrial, and also opposed the trial court's mid-trial

severance decision. Unlike *Jorn, supra,* where the trial judge acted on his own motion in declaring a mistrial without the defendant's consent and gave no consideration to the possibility of a trial continuance, the trial judge below scrupulously considered all of defendants' and the prosecutor's arguments before finally severing the marijuana counts under Fed.R.Crim.P. 14.

Appellants concede that some type of severance was manifestly necessary as a result of the improper misjoinder in the indictment. The question arises, however, as to whether, when such joinder, as it was here, was caused not by bad faith but at most by bad judgment on the part of the prosecution and by an initial error by the district court in not ordering a severance before trial, Speck and Bradley are entitled *per se* to interpose the bar of double jeopardy to a new trial against

them on the marijuana counts. The answer to that question is "no." Initial perfection in such matters is not guaranteed to any defendant. And if error in joinder occurs under Fed.R.Crim.P. 8(b), the trial court is empowered to sever after trial starts under Fed.R.Crim.P. 14 if manifest necessity so requires. If that were not so, "mistrials caused by prosecutorial or judicial errors could never be followed by second trials, because it is never manifestly necessary to make a mistake. Yet ... a prosecutor's blunder in drafting an indictment [can] suppl[y] manifest necessity for a mistrial." *United States v. Buljubasic,* 808 F.2d 1260, 1265 (7th Cir.), *cert. denied,* 484 U.S. 815, 108 S.Ct. 67, 98 L.Ed.2d 31 (1987). Thus, "[if] the judge makes a mistake before trial, it can be corrected and the accused tried properly. If the judge makes a mistake after trial,

that too can be corrected.... If the prosecution makes a mistake in drafting the indictment, and this causes a mid-trial dismissal, that may be corrected and the trial redone." *United States ex rel. Young v. Lane*, 768 F.2d 834, 839 (7th Cir.), *cert. denied*, 474 U.S. 951, 106 S.Ct 317, 88 L.Ed.2d 300 (1985) (citations omitted). See also *United States v. Beasley*, 510 F.2d 261, 274-75 (5th Cir.) (Fay, J.), *cert. denied*, 434 U.S. 863, 98 S.Ct. 195, 54 L.Ed.2d 138 (1977).

[6, 7] Speck and Bradley also assert in this appeal that, in any event, the severance ordered by the district court was not manifestly necessary. We disagree. The classic formulation of what constitutes manifest necessity was advanced by Justice Story in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824). Nevertheless, there is still "no precise formulation or

mechanical application" for determining what facts constitute manifest necessity, "for the 'high degree' of necessity mandated by the phrase can be found in a variety of circumstances." *Abdi*, 744 F.2d at 1503, quoting *Arizona v. Washington*, 434 U.S. 497, 506-07, 98 S.Ct 824, 830-31, 54 L.Ed.2d 717 (1978) (footnote omitted). To determine if severance was manifestly necessary, a reviewing court must examine "the entire record in the case without limiting itself to the actual findings of the trial court." *Abdi* at 1503. "The manifest necessity for a mistrial can exist alongside less drastic alternatives, so long as the record discloses that the trial court considered alternatives before declaring mistrial." *id.* Thus, an important consideration in an appeal such as this one is whether the trial court carefully considered the alternatives and exercised sound discretion and did not act

in an abrupt, precipitous or erratic manner. See *Jorn*, 400 U.S. at 487, 91 S.Ct. at 558. "The decision of the ... trial court that mistrial was a manifest necessity deserves great deference ... especially ... when the grounds for the mistrial relate to jury prejudice, for the trial judge is in a particularly good position to observe the jurors, the witnesses and the attorneys in order to evaluate the extent of the prejudice." Abdi, 744 F.2d at 1503, citing Arizona v. Washington, 434 U.S. at 510-14, 98 S.Ct. at 832-35. No party in a criminal prosecution "has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, `the public's interest in fair trials designated to end in just judgments' must prevail over the defendant's `valued right' to have his trial concluded before the first jury impaneled." Arizona v.

Washington, 434 U.S. at 516, 98 S.Ct. at 835-36 (1978), quoting Wade v. Hunter, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), the Court "upheld reprosecution" after a mistrial in an opinion which "appears to tie the judgment that there was no abuse of discretion in these circumstances to the fact that the judge was acting `in the sole interest of the defendant.'" Jorn, 400 U.S. at 482, 91 s.Ct. at 555, quoting Gori, 367 U.S. at 369, 81 S.Ct. at 1526.

[8] In its order dismissing appellants' motion to dismiss, the district court noted that "[a]s the trial progressed it became apparent to the court that it was difficult to separate the various conspiracies and that some severance was in order." The record reflects that all defendants agreed at some time during the trial that some type of severance was absolutely necessary;

they just could not agree with respect to who or what should be served. It is also clear that the district court, before declaring a mistrial, listened to detailed argument, devoted substantial time to the issue, carefully weighed possible alternatives and took into account prejudice to the non-appellant defendants, judicial economy and the avoidance of multiple litigations regarding the same or similar offenses. And, as in Gori, 367 U.S. at 369, 81 S.Ct. at 1526, in granting the co-defendants' severance motion, the court below acted "in the sole interest[s] of the defendant[s]," and contrary to the urging of the prosecutor. Under the circumstances, manifest necessity existed for the trial court to sever one or more charges and/or defendant.s In that light, as Judge Vance has written, "once a severance is found to be warranted by manifest necessity, the trial court has

sound discretion over who is to be retained and who is to be severed." United States v. Aguiar, 610 F.2d 1296, 1301 (5th Cir.) cert. denied 449 U.S. 827, 101 S.Ct. 91, 66 L.Ed.2d 31 (1980). It is true that the district court did not make a specific finding as to manifest necessity. However, that fact is of little import in this case in which the record contains more than "sufficient justification" for such a finding. Arizona v. Washington, 434 U.S. at 516-17. 98 S.Ct. at 835-36.

Accordingly, we conclude that the trial court soundly exercised its discretion in granting severance of the marijuana counts. Therefore, retrial of appellants upon the marijuana counts is not barred by the Double Jeopardy Clause. The district court's denial of appellants' motion to dismiss the marijuana counts is Affirmed, and the within case is Remanded

to the district court for trial of the marijuana counts.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5248

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT BRADLEY,
NORMAN SPECK,

Defendants-Appellants.

Appeal from the United States District for the Southern District of Florida

ON PETITION FOR REHEARING
(September 6, 1990)

BEFORE: KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants is denied.

ENTERED FOR THE COURT:

/S/ Phyllis A. Kravitch
United States Circuit Judge

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.